

Service Date: October 29, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Application of)	UTILITY DIVISION
U S WEST Communications, Inc. Pursuant)		
to Section 252(e) of the Telecommunications)		
Act of 1996 for Approval of its)		DOCKET NO. D97.7.135
Interconnection Agreement with Kevin)		
Kerr, dba Montana TEL-NET.)		ORDER NO. 6021

FINAL ORDER

Introduction

1. U S WEST Communications, Inc. (U S WEST) entered into a negotiated interconnection agreement with Kevin Kerr, doing business as Montana TEL-NET (TEL-NET). The agreement sets the terms for TEL-NET's entry into the local exchange market in areas presently served exclusively by U S WEST.

2. U S WEST filed the parties' agreement, entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Kevin Kerr Doing Business As Montana TEL-NET" (Agreement), with the Montana Public Service Commission (Commission) for approval on July 31, 1997. The Agreement was docketed as D97.7.135. Pursuant to § 252(e) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (February 1996) (the "1996 Act"), the parties must submit the agreement to the Commission for approval prior to implementation.

3. On August 27, 1997 the Commission issued a Notice of Application for Approval of Interconnection Agreement and Notice of Opportunity to Intervene and Comment requesting petitions for intervention by September 12, 1997 and comments by October 3, 1997. The Notice limited intervenors to addressing the grounds for Commission action identified in § 252(e)(2)(A)

of the 1996 Act. The Notice also stated that no public hearing was contemplated by the Commission unless requested by an interested party by September 12, 1997.

4. The Commission's published notice advised interested parties in the geographic areas affected by the agreement that intervention was limited and that the Montana Consumer Counsel (MCC) could be contacted to represent consumer interests. No comments or requests for intervention have been received by the Commission.

5. Upon review of the agreement, the Commission makes the following findings, conclusions and order.

Applicable Law and Commission Decision

6. The interconnection agreement negotiated by U S WEST and TEL-NET provides for purchase of unbundled elements and facilities-based interconnection and incorporates a separate resale agreement previously negotiated. It provides the rates, terms and conditions for interconnection in areas served by U S WEST in Montana.

7. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. The Commission must approve or reject the parties' Agreement with written findings as to any deficiencies no later than October 29, 1997 or it will be deemed approved as submitted. 47 U.S.C. § 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

8. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the state commission's authority is preserved in § 252 (e)(3) to establish or enforce other require-

ments of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Further, § 253 of the 1996 Act does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

9. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in § 251(b) and (c). 47 U.S.C. §§ 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

10. By approving this agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (e) prevent the Commission from addressing such issues in this proceeding.

11. No comments have been received from interested parties asserting that the agreement does not comply with federal law as cited above or with state telecommunications requirements. The MCC, who represents the consumers of the State of Montana, has not intervened or filed comments that indicate that he believes that the agreement is not consistent with the public interest, convenience and necessity. No other telecommunications carrier has filed comments to indicate that the agreement is discriminatory toward a carrier not a party to the agreement.

12. With the exception of particular sections of the agreement as specifically discussed below, the Commission finds that the terms in the parties' agreement appear to conform to the standards required by the Act. In approving the agreement, the Commission is guided by provisions in federal and state law which have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

The Commission rejects the following terms:

13. Construction - Section XXIV(C) of the Agreement (p. 73) states: "Except where required, all necessary construction will be undertaken at the discretion of [U S WEST], consistent with budgetary responsibilities and consideration for the impact on the general body of customers." The Commission finds that this provision could conflict with the public interest and is unnecessary in light of § XXIV.B which provides that when facilities for interconnection services are not available and U S WEST is required to construct them, U S WEST will develop the cost that TEL-NET is required to pay to U S WEST for construction. Subsection (A) also provides that when U S WEST is required to build facilities for network interconnection, construction charges will apply. Both subsections (A) and (B) contemplate situations where U S WEST may not be required to construct facilities .

14. Dispute Resolution - Section XXVII.R sets forth the parties' agreement pertaining to resolution of claims, controversies or other disputes which cannot be settled through negotiation. It provides that such disputes be resolved by arbitration conducted by a single arbitrator, who is an attorney, under the rules of the American Arbitration Association, and that the arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated and the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Agreement to include this language.

15. Ordering and Maintenance - Section IV.C on pages 7-9 of the Resale Agreement includes several problematic provisions. First, subsection C.1 includes a statement that "nothing in this Agreement, except as provided in Section IV.C.7(e), shall be deemed to prohibit USWC from discussing its products and services with Reseller's customers who call USWC for any reason." (Emphasis added.) Although § IV.C.7(e) provides that U S WEST representatives will not discuss its products or services with TEL-NET's customers during the course of repair calls or visits, this is the only limitation included in the Agreement. Such a provision may set the



16. Second, § IV.C.2 contains a sentence at the end of the second paragraph which provides, "USWC will not provide Reseller with the name of the other reseller or service provider selected by the end user." Such a provision is not appropriate where U S WEST has this information available to itself and is rejected as not being in the public interest.

18. Rates and Charges - The second paragraph of § IV.E.1 beginning on page 10 of the Resale Agreement contains language which is unnecessary and confusing given the language in the next paragraph on page 11. The following sentence should be stricken from the Agreement as the Commission did not establish permanent prices in the AT&T arbitration referenced in this and other sections of the Agreement: "The Parties hereby agree that whatever services and wholesale discount rate the Commission establishes in its final decision in the AT&T Arbitration shall become effective with respect to this Agreement on a going-forward basis and without true-up to the effective date of this Agreement on the date of the Commission's decision. Appendix A will be modified to reflect such rates and services."

20. Term - Section VII.A should be amended to strike the phrase "shall be effective" in the first line of the first sentence and to insert the word "months" in the second

sentence ("no later than six (6) . . .") to correct a typographical error. Other provisions in the parties' Agreement provide for the effective date of the entire Agreement.

21. Payment - Section VII.C sets forth in detail the provisions for payment to U S WEST by TEL-NET. It provides for suspension of the provision during the initial three months of the Agreement and for three billing cycles. A reseller's payment to U S WEST, if not made pursuant to the terms of this section, could place the reseller's end user customers' services in jeopardy of being disconnected through no fault on their part. We note that the parties have agreed that the payment and dispute resolution process set forth in § VII.C is a new procedure and can be re-opened for negotiation at any time within the first twelve months of the Agreement.

22. However, this section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users and TEL-NET must follow the same rules. If notified of a pending termination of service to the reseller's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to the reseller's end users with no notification to the Commission. The Commission rejects § VII.C.5 of the parties' Resale Agreement. The parties may amend this section of the Agreement to include a notification provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. TEL-NET is a telephone competitive local exchange carrier intending to provide regulated services in the State of Montana.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.



3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934, 47 U.S.C. §§ 151, et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The Commission has jurisdiction to approve or reject the interconnection agreement (or portions thereof) negotiated by the parties and submitted to the Commission according to 47 U.S.C. § 252(e)(2)(A). Section 69-3-103, MCA.

6. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the U S WEST/TEL-NET Agreement by October 29, 1997, or the agreement will be deemed approved.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the interconnection agreement of the parties is approved as discussed herein, subject to the following conditions:

1. Within 14 days of service of this order the parties may file an amendment to the Agreement consistent with the Commission's decision in this proceeding.

2. The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 27th day of October, 1997, by a vote of 5-0 .



BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. *See* ARM 38.2.4806.